

Torunn Kvinge and Anne Mette Ødegård

Protectionism or legitimate protection?

**On public regulation of pay and working conditions
in Norwegian maritime cabotage**

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Hvem kan seile sin egen sjø?

Om statlige reguleringer av lønns- og arbeidsvilkår i norsk innenriksfart

Translated by The Language Factory, UK

Contents

Abbreviations.....	5
Foreword	6
Abstract.....	7
Summary	8
1 Introduction	10
2 Background	12
3 What effect do international regulations have on Norway’s freedom of action in domestic trade?	18
3.1 International law	18
3.2 World Trade Organisation – WTO.....	20
3.3 The EU regulatory framework	21
3.4 What room is there for national action?	26
3.5 Regulatory frameworks in other shipping nations.....	27
4.1 What is regarded as domestic trade?	32
4.2 Immigration Act	33
4.3 General application of collective agreements	34
4.4 State subsidy schemes	37

5 Summary and discussion	39
Legitimate worker protection or protectionism?.....	40
What room is there for national action?	40
References	44

Abbreviations

EC: European Community

ESA: European Surveillance Authority/EFTA's supervisory body

EU: European Union

EEA: European Economic Area

FR: Fraktefartøyenes Rederiforening (Norwegian Association of Cargo Freighters)

IBF: International Bargaining Forum

ILO: International Labour Organisation

IMO: International Maritime Organisation

ITF: International Transport Workers' Federation

LO: Landsorganisasjonen (Norwegian Confederation of Trade Unions)

NIS: Norsk Internasjonalt Skipsregister (Norwegian International Ship Register)

NOR: Norsk Ordinært Skipsregister (Norwegian Ordinary Ship Register)

RLF: Rederienes Landsforening (Federation of Norwegian Coastal Shipping)

UNA Norway: The United Nations Association of Norway

UNCLOS: United Nations Convention on the Law of the Sea

WTO: World Trade Organisation

Foreword

This analysis has been carried out at the request of the joint Cooperation Committee of LO, the Norwegian Seamen's Union and the Norwegian Maritime Officers' Association. Several people have contributed with information and advice during the project. Thanks to Jan Balstad, the former minister of trade and shipping, Jacqueline Smith, the head of the Norwegian Seamen's Union, Birger Mordt, a lawyer at the union, Ståle Dokken, a head of department at LO, Nils Pedersen, the ITF's coordinator in Norway, Harald Thomassen, director of the RLF, Siri Hatland and Toril Vik Veland, the managing director and the head of the maritime division of FR, and Edith Midelfart and Viggo Bondi, lawyers at the Norwegian Shipowners' Association for sharing their knowledge with us. We are, furthermore, indebted to a number of people for helpful suggestions and comments on an earlier draft of a the report, especially Johan Schelin, reader at the Maritime Law Institute at Stockholm University, Kristin Alsos and Line Eldring, research fellows at Fafo and Jon Erik Dølvik, head of research at Fafo. Needless to say, we are responsible for any errors or omissions. Thanks, finally, to Fafo's information department for preparing the manuscript for printing and to thelanguagefactory.co.uk for translating the document from Norwegian into English.

Oslo, August 2010

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Abstract

The purpose of this report is to review the premises for governments' actions to secure equal treatment for foreign and native seamen who are working on ships operating in Norwegian domestic traffic. Domestic traffic includes transportation of passengers and goods between Norwegian ports, as well as offshore transportation.

The report presents a description of the existing international and national regulations. As part of the EU's internal market through the EEA Agreement, Norway has to get in line with the EU's regulations in this area. We try to explore what kind of consequences these regulations imply for domestic traffic and we also point out possibilities that are not yet tested. One of the tools might be to change the Act on General Application of Collective Agreements in order to include ships registered in EU countries. Questions about how this can be carried out need further examination.

Norway has traditionally pursued a very open and non-discriminating policy with regard to its internal waters. The report shows that many other nations have strong cabotage regulations when it comes to protecting domestic working conditions. The possible demarcation line between legitimate worker protection and protectionism is discussed at the end of the report.

Summary

Regulation of pay and working conditions in Norwegian domestic trade has been significantly stricter for ships listed in the Norwegian Ordinary Ship Register (NOR) than for ships listed in other registers. Over the last few years, the proportion of foreign-registered ships in Norwegian domestic traffic has increased significantly. These are mainly ships registered under so-called 'flags of convenience'. Many of these ships may be under the control of Norwegian owners, i.e. Norwegian shipowners may have chosen to register some of their ships that engage in Norwegian domestic trade under flags of convenience. The available statistics in this area, however, are inadequate, as they do not report on any connection between a ship's flag affiliation and the nationality of the ship's owner.

Under the new immigration provisions that came into force on 1 May 2010, ships sailing between Norwegian ports under flags of convenience will enjoy the same status as ships registered in NOR, as foreign seafarers (with the exception of EEA citizens) on either type of ship must have residence permits. One requirement for a residence permit is that pay and working conditions must not be worse than is normal in Norwegian domestic trade. This, then, applies to the citizens of third-party states, since the EEA Agreement does not allow the requirement of residence permits with respect to EEA citizens.

The Norwegian authorities have also chosen to exempt ships registered in EEA countries other than Norway from the new immigration provisions. This means neither citizens of the EEA nor citizens of third-party states (for example, a Filipino employed on a ship registered in Cyprus) need residence permits in order to work in Norwegian domestic trade aboard ships registered in other EEA countries. This gives Norwegian shipowners an incentive to register ships that are to engage in Norwegian domestic trade under other EEA flags. At the time as the EEA Agreement was concluded, the differences between Norway and the EU countries with regard to pay and working conditions were relatively small. In the meantime, many new countries have joined, among them countries that are regarded by the International Transport Workers' Federation (ITF) as flag-of-convenience countries, such as Gibraltar, Cyprus and Malta. It is paradoxical that demands with regard to pay and working conditions in domestic traffic are placed with respect to seafarers aboard ships registered in NOR or in third-party states while such demands are not placed with respect to seafarers on ships registered in the EEA.

The EEA Agreement opens the way for the introduction of national regulations to assure all employees a minimum standard with regard to pay and working conditions, irrespective of nationality. Norway may therefore consider making an amendment to the Act on General Application of Collective Agreements, so that it may be made to apply to EEA-registered ships in some or all of the domestic trade and so that, in that case, the new regulations are consistent with the provisions of the EU Cabotage Regulation. Because the Act on General Application of Collective Agreements already covers NOR ships, this cannot be considered a discriminative measure. The goal must be to ensure equal conditions for seafarers in domestic trade, regardless of where the ships are registered.

It is common practice in seafaring nations to have cabotage regulations that restrict the access of foreign-registered ships or foreign seafarers to domestic trade (the so-called Jones Act in the USA being the best-known example) and/or regulations that are intended to ensure equal rights for all

seafarers, irrespective of nationality. Several EU countries (France, Greece, Italy, Portugal and Spain), for example, impose minimum-wage requirements for seafarers on foreign-registered ships in domestic trade.

1 Introduction

For a long time, coastal traffic and the traffic from mainland Norwegian ports to installations on the Norwegian Continental Shelf were dominated by ships registered in Norway. In the last few years, however, ever more foreign-registered ships have been operating in such traffic. These can be ships listed in other EEA registers or registered in countries outside the EEA (third-party states) and, in that case, mainly under so-called flags of convenience.¹ According to the seamen's unions, to some extent the pay and working conditions of seafarers on many of these ships fall considerably short of the requirements rooted in Norwegian collective agreements.² The result can be that shipowners complying with Norwegian requirements are driven out of competition and that domestic seafarers and skills are set ashore.³

In this report, we discuss the Norwegian authorities' room for action when it comes to making arrangements so that foreign and Norwegian workers enjoy equal pay and working conditions in Norwegian domestic trade.⁴ Here, unless otherwise stated, 'domestic trade' means the coasting trade as well as the shipping connected to Norwegian offshore activity on the Continental Shelf. One question that is discussed, among other things, is that of the dividing lines and border issues between legitimate worker protection and economic protectionism. The method we have employed comprises document analysis and interviews with key players in the industry.

The report is constructed as follows: a short summary of the trends in Norwegian domestic trade follows in Chapter 2. Chapter 3 provides a survey of how international regulations affect different nations' freedom of action with regard to statutory and conventional regulation of domestic trade. A separate section describes particular national provisions that regulate domestic traffic in other major shipping nations. In Chapter 4 we discuss some national regulations with regard to pay and working conditions in Norway. A summary and discussion follow, finally, in Chapter 5. One of the

¹ The International Transport Workers' Federation (ITF) has the following list of 'flags of convenience': Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda (UK), Bolivia, Burma, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, French International Ship Register (FIS), German International Ship Register (GIS), Georgia, Gibraltar (UK), Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands (USA), Mauritius, Mongolia, Netherlands Antilles, North Korea, Panama, São Tomé and Príncipe, St Vincent, Sri Lanka, Tonga and Vanuatu. <http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm>. There is further discussion of the term 'flag of convenience' in Schelin (1997:222–233).

² In this project, we have not had the opportunity to present figures regards the proportion of foreign employees (posted or permanently employed) on Norwegian-controlled or foreign-controlled ships in Norwegian domestic traffic or their pay and working conditions.

³ Equal pay and working conditions are probably of great importance with a view to keeping Norwegian seafarers in the coasting trade and in the traffic between mainland Norwegian ports and installations on the Continental Shelf. An interesting problem, which will not be analysed in this project, is what role Norwegian seamen's skills play in wealth creation in the maritime sector.

⁴ The theme is the Norwegian authorities' room for action, so the labour struggle – in the form of boycotts of ships, for example – is not considered in this report.

questions discussed in this section is: what measures may be appropriate to ensure the same pay and working conditions for foreign seafarers as for Norwegian seafarers in domestic trade?

2 Background

Shipping is a global, competitive industry. Revenues fluctuate with the raw-materials markets to a large extent. Ships have long lifespans and it takes time to adjust the size of the fleet to demand in the international freight market.⁵ Historically Norway's foreign fleet has been dependent on the open seas and thus has been an avid supporter of free trade. Politically there is the broadly accepted understanding that national protective measures excluding players from other shipping nations can lead to counter-measures and therefore be unfavourable for the Norwegian foreign fleet's private interests. Domestic trade is, however, regarded as part of the domestic economy and is not, therefore, subject to the international commitments of a liberal shipping policy in the same way as foreign trade.⁶

The market for seafarers is relatively globalised and pay levels vary a great deal from one flag state to another. Shipowners can to some extent decide in which flag states they register their ships or shipping companies. In the 1970s and 1980s, there was a general trend for shipping companies in the OECD countries increasingly to move away from registering their ships in the traditional shipping countries and toward registering them under so-called flags of convenience. Such a development also took place in Norway. In the draft bill for the Norwegian International Ship Register (NIS)⁷, the situation is described as follows (translated from Norwegian):

The shipping companies have adapted to developments in the international shipping market by registering ships abroad. Furthermore, foreign-owned ships are, to an ever greater extent, operated from Norway. If the rapid downsizing of the fleet continues, the overwhelming bulk of Norway's fleet of foreign trade will within a very short time be externally registered or sold. In this case, the employment of Norwegian seafarers in foreign trade will, furthermore, be sharply reduced. The externally registered ships will generally be operated from Norway, so the onshore maritime community can to a certain extent be maintained. This includes shipyards, suppliers of ship fittings, ship financing, insurance, shipbrokers, research, classification, training, public administration, etc. Some have pointed out that if the 'outflagging' of Norwegian ships continues then the shipowners' associations could follow suit and move the bulk of their operations abroad. The foundations for the rest of the maritime community will also be compromised by this.⁸

⁵ For more information, see for example Stopford (1988) and Schelin (1997).

⁶ See also Pape (2003), who emphasizes that almost every country in the world has restrictions on the access of foreign-registered ships to the carriage of cargo and passengers between domestic ports.

⁷ LOV 1987-06-12 nr 48 Lov om norsk internasjonalt skipsregister (NIS Act).

⁸ Ot.prp. nr. 45 (1986–1987). Om lov om norsk internasjonalt skipsregister, p. 5. It is also stated there (p. 10) that for some shipping companies it is important to be able to sail under the flag of Norway. 'For many cargo owners, the Norwegian flag is a sign of quality, and this can be an important element in the shipping companies' marketing.' (Translated from Norwegian)

NIS was established on 1 July 1987.⁹ The aim was to improve the competition situation for the operation of ships in foreign trade under the flag of Norway. In addition, a Norwegian international ship register could ‘ensure that Norway continues to make a substantial contribution to the maritime transport capacity that NATO needs in a crisis situation or war situation’.¹⁰ (Translated from Norwegian)

Ships, which are registered in NIS, sail under the Norwegian flag and are subject to Norway’s jurisdiction and Norwegian maritime legislation applies, with certain exceptions. Working and pay conditions must be fixed in collective agreements. Furthermore, the costs of the engagement and signing on of seafarers are borne by the shipping company or another employer. Collective agreements may be concluded with Norwegian and/or foreign trade associations.¹¹

The register is open to all types of owners and establishment in Norway is not required. Norwegian operation and a local representative, however, are required, as a result of the Convention on the Law of the Sea, Article 91, which says there must be a genuine link between the flag state and the owner of the ship.¹² During the work on the NIS Act, the proposal came up for consideration that a foreign owner should be able to enter a ship in the register without establishing a company in Norway that stood as the owner of the ship. This, however, was rejected, because then NIS would be substantially identical to what have traditionally been regarded as flag-of-convenience registers:

The government has arrived at the conclusion that it will not be very beneficial for a Norwegian international ship register to be regarded as a flag-of-convenience register or meet with claims that it conflicts with international standards. Furthermore, emphasis must be placed on the ability to exercise supervision of activity under Norway’s jurisdiction. Proposals to permit direct registration will not, therefore, be advanced.¹³

⁹ Machine-operated passenger ships and cargo ships, as well as hovercraft, drilling platforms and other portable installations, can be registered in NIS if they have not been entered in other countries’ registers (cf. NIS Act, §1).

¹⁰ See Ot.prp. nr. 45 (1986–1987), p. 13.

¹¹ However, Norwegian trade associations have the right to take part in all negotiations about entering into collective agreements – see the NIS Act, §6(2).

¹² Under the NIS Act, §1, this requirement is met if

1. the owner satisfies the nationality conditions of the Maritime Code (LOV 1994-06-24 nr 39: Lov om sjøfarten), §1,
2. the owner, not satisfying the nationality conditions of the Maritime Code, §1,
 - a) is a stock corporation, a public limited company or a general partnership with its head office in Norway, or
 - b) is a jointly owned shipping company, with a managing owner who satisfies the requirements for a managing owner in the Maritime Code, Chapter 5.
3. the owner, not satisfying the conditions in Item 1 or 2, has nominated a representative who has authority to accept proceedings on behalf of the owner. The representative must meet the nationality requirements set for managing owners in the Maritime Code, §103. The operation of a ship registered in accordance with Item 2 or 3 above shall be managed by a Norwegian shipping company with its head office in Norway.

¹³ See Ot.prp. nr. 45 (1986–1987), p. 19.

Every Norwegian ship¹⁴ above a certain size is obliged to register with the Norwegian Ordinary Ship Register (NOR) unless it is listed in another country's register or in NIS.

In 1995, in connection with the EEA Agreement, the way was opened for EEA owners to enjoy the same status as Norwegian citizens. The provision to the effect that EEA citizens shall enjoy the same status as Norwegian citizens is in agreement with the so-called Factortame Ruling of the European Court of Justice.¹⁵ In short, the ruling means that EEA citizens are granted the right to register their ships where they like, as long as each ship is operated from the country of registration (via a subsidiary, for example).¹⁶

Technical or commercial operation from Norway and the nomination of a legal representative are required for an EEA citizen to be able to register with NOR. Technical operation means the manning, the purchase of propellants and other supplies, incoming and outgoing current payments, the organisation of the ship's maintenance, etc.¹⁷

The Norwegian authorities have full jurisdiction over vessels owned by other EEA citizens but registered in NOR. On the whole, the NOR ships sail between Norwegian ports or between oil installations in the North Sea and ports in mainland Norway.¹⁸ Ships registered in NIS are not generally allowed to carry cargo or passengers between Norwegian ports or to sail on fixed routes between Norwegian and foreign ports.¹⁹ In this context, installations for oil and gas operations on the Norwegian Continental Shelf are also regarded as Norwegian ports.²⁰ The following reason is

¹⁴ Under the Maritime Code, §1, Pars. 1 and 2, a ship shall be regarded as Norwegian when it has not been entered in another country's shipping register and it is owned by: '1) a citizen of Norway; 2) a jointly owned shipping company or other Norwegian company whose members have unlimited liability for the company's commitments, if Norwegian citizens are co-owners of at least six-tenths; 3) a general partnership, if Norwegian citizens own at least six-tenths of the base capital and at least six-tenths of the partnership capital; 4) a limited-liability company that does not fall under no. 3, if the company's head office and the seat of the board are in Norway and the majority of the board, including the chairman of the board, is made up of Norwegian citizens who are residents of Norway and have lived here for the last two years, and Norwegian citizens own stocks or shares corresponding to at least six-tenths of the company's capital and can exercise voting rights in the company with at least six-tenths of the votes.

Upon application of this section, that which is owned by the Norwegian State, institutions or funds governed by the Norwegian State, Norwegian municipalities, companies that themselves meet the conditions in Clause 1, or Norwegian banks, foundations or associations shall be assessed as equivalent to that which is owned by Norwegian citizens, if the seat of the board is in Norway and the majority of the board is made up of Norwegian citizens residing in Norway.' (<http://www.lovdato.no/all/hl-19940624-039.html>) (Translated from Norwegian)

¹⁵ See Tiberghien (1997:391–399).

¹⁶ For a discussion of these questions, see also, for example, Schelin (1997:217–220).

¹⁷ Cf. Maritime Act, §1, Pars. 3–5.

¹⁸ Drilling platforms and similar portable installations may also be registered in NOR.

¹⁹ Ships registered in NIS are not allowed to take passengers on fixed routes between the Nordic countries, either (cf. FOR 1993-07-09 nr 596: Forskrift om begrenning av fartsområde for passasjerskip registrert i NIS, §1).

²⁰ See the NIS Act, §4(1).

given for this in the draft NIS bill: 'Restrictions on ports of call are proposed because it should only be ships engaging in international shipping that can be entered in this register.'²¹

To sum up: ships that are under the control of Norwegian owners (Norwegian-controlled ships), then, may be listed in Norwegian registers (NIS or NOR) or in foreign registers. Regardless of registration, the ships may have Norwegian or foreign crews. The statistics on the numbers of foreign employees on Norwegian- and foreign-registered ships in Norwegian domestic trade are inadequate. Statistics Norway (SSB), however, surveys where Norwegian-controlled ships are registered and under what flags the ships using Norway's coast sail. Figure 2.1 shows that some six out of ten tonnes carried on ships engaging in Norway's coasting trade are carried on ships registered in NOR or NIS.²² Most of them by far are registered in NOR, because NIS ships are not generally allowed to engage in Norwegian domestic trade unless they are covered by the let-out clauses.²³ Almost three out of ten tonnes went on ships that were registered under so-called flags of convenience, whereas one tonne in ten went on ships in other registers (mainly Nordic ones). Most ships under so-called flags of convenience are registered in the Bahamas and Panama (see Figure 2.1).²⁴

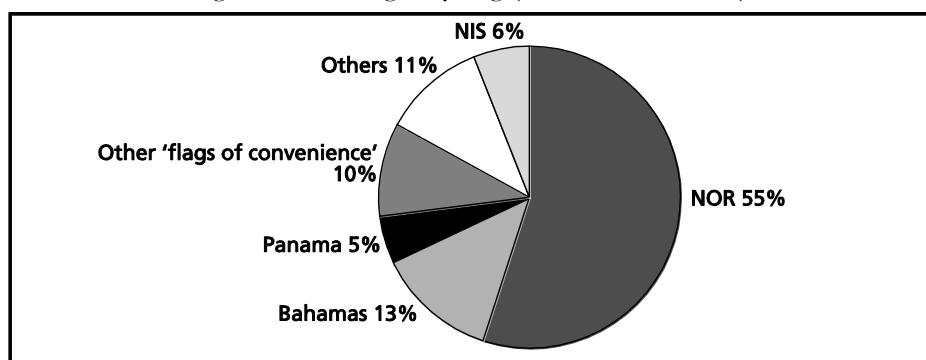
²¹ Ot.prp. nr. 45 (1986–1987), p. 20.

²² According to Pape (2003:17), the proportion of domestic trade that was carried on Norwegian-registered vessels in the period of 1997–1998 was approximately 80 per cent. After 1999, the statistics were restructured. In the first quarter of 2002, the proportion carried on Norwegian-registered vessels was 85 per cent (64 per cent NOR and 21 per cent NIS).

²³ See FOR 1989-08-11 nr 802: Forskrift om utvidet fartsområde for lasteskip registrert i norsk internasjonalt skipsregister. This regulation extends to cargo ships built or fitted out to transport special kinds of cargo. If a ship has a Norwegian shipmaster then under §2 of the regulation it may 'carry such cargo as it has been specially built or fitted out for between Norwegian ports when it is on the way to or from a foreign port with cargo and the carrying is not part of a fixed route plan. It is a further condition that such transport result in reasonable utilisation of the tonnage available, and not result in undesirable consequences for ships registered in the Ordinary Ship Register.' (Translated from Norwegian) The Maritime Directorate shall maintain a list of ships that may carry cargo between Norwegian ports once the satisfaction of the specified requirements has been assessed.

²⁴ Statistics Norway also maintains surveys showing arrivals from one region of the world to another, i.e. what places Norwegian-controlled ships (registered in Norway or abroad) mainly visit. Norwegian-controlled ships left one Norwegian port or other almost 20,000 times in 2008, mainly bound for the Nordic countries (including Norway), the Baltic and Northern Europe. As many as 80 per cent of all the trips from Norwegian ports were to other Norwegian ports. Norwegian-controlled ships also extensively engaged in interregional traffic elsewhere in the world (see <http://www.ssb.no/emner/10/12/40/skipanut/tab-2009-06-24-06.html>). Of all the Norwegian-controlled ships that called in at one port or another in the world (including Norwegian ports) in 2008, approximately half were registered under foreign flags. The proportion registered abroad, however, varied between ship types. On a worldwide basis, for example, more than 80 per cent of all arrivals by Norwegian-controlled offshore ships were made by ships sailing under the Norwegian flag, while the corresponding figure for mixed cargo and other dry cargo ships was 47 per cent (see <http://www.ssb.no/emner/10/12/40/skipanut/tab-2009-06-24-08.html>).

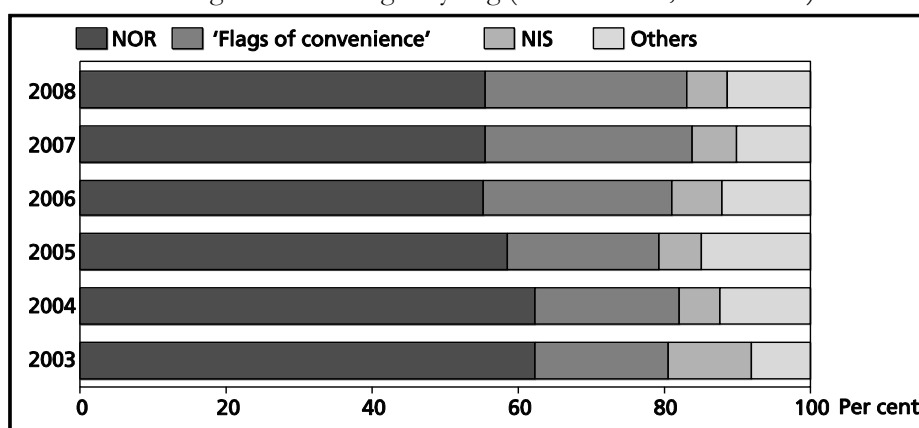
Figure 2.1: Port statistics – goods as tonnages by flag (coastal traffic, 2008)



Source: own calculations based on statistics from Statistics Norway²⁵

Figure 2.2 shows the trends in transport in Norway's coasting trade from 2003 until and including 2008 with regard to the flag affiliations of the ships. There is a clear tendency for domestic transport to be increasingly conducted on ships sailing under flags of convenience. Unfortunately, Statistics Norway does not maintain information on how large a proportion of this group of ships is under the control of Norwegian owners. Nevertheless, because the total tonnage in the coasting trade was relatively stable during this period, the question may be asked whether the change is related to the fact that Norwegian shipping companies are 'outflagging' from national registers to flags of convenience. Whereas NIS ships are not generally allowed to engage in domestic trade, there is no such restriction for ships listed in foreign registers.

Figure 2.2: Port statistics – goods as tonnages by flag (coastal traffic, 2003–2008)



Source: own calculations based on statistics from Statistics Norway

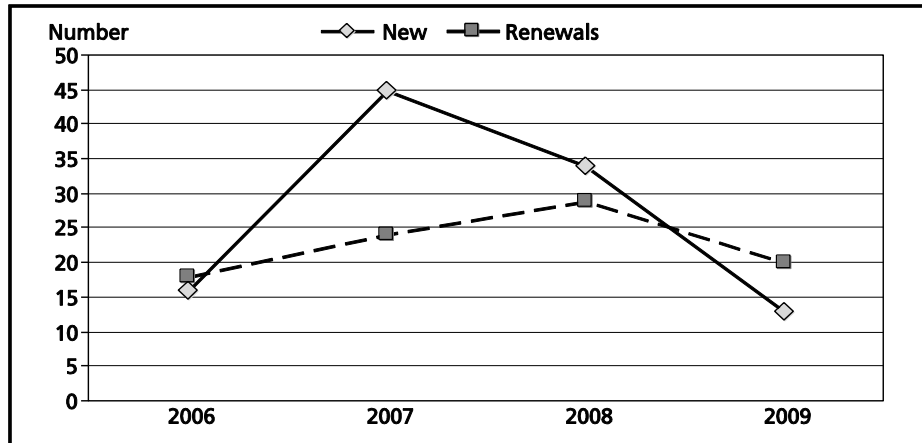
The Norwegian Directorate of Immigration (UDI) keeps figures for the numbers of work permits issued to foreign seafarers on ships with Norwegian owners who are listed in the Register of

²⁵ Figures 1 and 2 are based on: http://statbank.ssb.no/statistikkbanken/Default_FR.asp?PXSid=0&nvl=true&PLanguage=0&tilside=selecttable/hovedtabellHjem.asp&KortnavnWeb=havn).

Total tonnage: 2008 = 59 million; 2007 = 62 million; 2006 = 62 million; 2005 = 57 million; 2004 = 57 million; 2003 = 52 million.

Employers in Brønnøysund for the period of 2006–2009. In domestic trade, relatively few such work permits have been issued over the last few years (see Figure 2.3).²⁶

Figure 2.3: Numbers of work permits issued to foreigners employed by Norwegian employers in domestic trade (absolute figures)²⁷



Source: UDI (special data runs)

²⁶ During the period in question, there was only the requirement that foreign seafarers on Norwegian-registered ships should have work permits, whereas foreign-registered ships in domestic trade were not affected. We shall return to this in Chapter 4.

²⁷ The statistics also encompass the letting of ships and boats with foreign personnel, but do not encompass transport on rivers or lakes.

3 What effect do international regulations have on Norway's freedom of action in domestic trade?

Work at sea is to a great extent regulated by international agreements. Both international law²⁸ and national law affect the freedom of action of vessels in domestic trade. The various regulations can end up on a collision course and give rise to confusion as regards what kind of regulatory framework to follow. This chapter will provide a survey of the international regulations that affect different nations' freedom of action with regard to statutory and conventional regulation in domestic trade. Over the last ten years, the framework conditions for shipping have more or less continuously been a bone of contention (Pape 2003:3).

3.1 International law

The 1982 UN Convention on the Law of the Sea (UNCLOS) is an international agreement regulating traffic and economic activity on the open seas, as well as the rights that coastal states have within their regions. It came into force in 1994 and has been ratified by 160 countries. Norway endorsed it in 1996. The convention regulates the sovereignty of flag states over their ships. Article 94(1) reads:

Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.²⁹

The flag state may, however, share its jurisdiction over the vessel with the coastal state. In UNCLOS, each country's maritime boundary was set at 12 nautical miles off the coast.³⁰ This area is referred to as the territorial waters (or the territorial sea). In principle, countries have the same authority within these boundaries as they do over their terrestrial territories. In international law, the

²⁸ International law may be defined as a system of laws regulating relations between sovereign states, i.e. their rights and duties with respect to one another (Oxford Dictionary of Law, 1997). In the same way that states may be regulated by different legal systems, relations between them are regulated by international law. In contrast to the state legal systems, international law does not have an integral, cohesive system to oversee and enforce these regulations. This is mainly due to the independence of different states – the occasion they have to preside over their own circumstances (The United Nations Association of Norway).

²⁹ UNCLOS, §91 means there must be a genuine link between a state and a ship registered under the flag of the state. Dalheim et al. (2008:97) point out that '[f]or ships under so-called flags of convenience, questions may be asked about whether there is a genuine link between the state and the ship. If no real link is in evidence, it may be claimed that the regulations of the Convention on the Law of the Sea with regard to the flag state's exclusive jurisdiction over its ships do not apply. What link the convention demands, however, is not clear.' (Translated from Norwegian)

³⁰ A coastal state may define an adjoining zone of a further 12 nautical miles in order to exercise jurisdiction over activities such as smuggling and illegal immigration.

term ‘coastal-state jurisdiction’ is applied to what a state can control in its area. Foreign ships have the right to move in these waters. The coastal state may adopt regulations for *passage through its territorial waters*, with regard, among other things, to maritime safety, the protection of navigational aids, cables and pipes, the conservation of living resources in the sea and the environment. The regulations, however, cannot extend to the design, construction, manning or equipment of foreign ships, unless the regulatory framework implements generally recognised international regulations or standards (UNCLOS, Article 21). In other words, when ships pass through, it is the flag state’s jurisdiction that comes into play as far as working conditions aboard the ships are concerned.

On the other hand, when foreign-registered ships sail in internal waters (*domestic or cabotage trade*), in principle it is the coastal state’s jurisdiction that applies. Here many of the major shipping nations apply restrictions intended to protect these nations’ citizens (shipping companies or seafarers). We shall come back to this in Chapter 3.5.

Shelf state jurisdiction (the authority each country has over its continental shelf) has a more restricted meaning as far as vessels are concerned. Here it is the right to extract natural resources that is most important. The principle of the coastal state’s right to its continental shelf was affirmed at the UN’s Geneva Conference in 1958. The outer limits of the continental shelf would be set at a water depth of 200 metres or as far off shore as it was possible to extract resources on the seabed. In addition, every country with a coast was granted the right to proclaim its own economic zone, extending up to 200 nautical miles from the coast. Within this limit, each country has the right to extract natural resources.³¹ The rights of a coastal state with regard to its continental shelf must not infringe or result in any unjustifiable interference with navigation or the rights and freedoms that other states have under UNCLOS (Article 78).

Under UNCLOS, the flag state’s regulations must agree with conventions drawn up within the UN International Maritime Organisation (IMO)³² and the UN International Labour Organisation (ILO).³³

The ILO’s navigation conventions have now been collected in a general maritime labour convention (no. 186), which was adopted in 2006.³⁴ The Maritime Labour Convention brought together all the conventions and recommendations adopted in the ILO since 1920 and covers every important aspect of working and living conditions on ships. This includes minimum ages, health requirements, employment services, employment agreements, the payment of wages, working hours and rest periods, holidays, homeward passage, cabins and leisure areas on board, catering, medical assistance, the responsibility of shipping companies in case of illness or personal injury, requirements with regard to working environments and protection against occupational accidents, welfare systems in the ports and insurance schemes for medical care and for payments in case of illness or occupational injury. The current navigation conventions will apply until further notice. The Consolidated Maritime Labour Convention will come into force when at least thirty countries, with a 33-per cent total proportion of the world’s shipping tonnage, have ratified it. Thus the existing conventions will gradually be phased out.

³¹ If a country can show that its continental shelf stretches farther than 200 nautical miles from the coast, it can demand to have the economic zone extended.

³² International Maritime Organisation. Until 1982 the organisation was called the Intergovernmental Maritime Consultative Organisation (IMCO).

³³ The ILO is the UN organisation for working life and comprises representatives for employers, workers and authorities.

³⁴ The convention does not apply to fishing or catcher vessels, warships, Royal Norwegian Navy support vessels or portable installations in the petroleum business – St.prp. nr. 73 (2007–2008).

In the convention, there is the requirement that any ship over 500 gross tonnes (gt) engaging in navigation internationally or between two foreign ports must have a certificate. The certificate is evidence that the flag state has conducted supervision and found the working and living conditions on board the ship to be consistent with the requirements of the convention.³⁵

The ILO also draws up minimum standards for pay. The Joint Maritime Committee, an ILO body composed of shipowners' associations and the International Transport Workers' Federation (ITF), sets minimum wages³⁶, and it is the ITF that has so far seen to it that this regulatory framework is followed.³⁷ The Joint Maritime Committee's rates provide the basis for the compilation of the ITF's standards, which are considerably higher than those at which the committee initially arrived. For ships covered by collective agreements, the minimum wages are even higher. The basis for the collective agreements is dealt with on an international level, between the ITF and representatives of the employers' side – the so-called International Bargaining Forum (IBF). These framework agreements then provide the point of departure for national negotiations between the seamen's unions and employers' organisations in each individual country. The ITF has 130 inspectors all over the world who inspect arriving ships to ensure that the seafarers enjoy pay, working and accommodation conditions in line with the international regulatory framework.

STCW 95 is the July 1995 revision (adopted by the IMO) of the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. All persons in on-board positions subject to the obligation of certification must have certificates that have been updated in relation to the requirements of the revised STCW 95 Convention. Certificates issued by or on the authority of a state that is not party to the STCW Convention shall not be recognised (Norwegian Maritime Directorate).

By ratifying (approving) a convention, states commit to comply with the convention and at the same time to accept international supervision via the ILO's monitoring system (UNA Norway webpages).

3.2 World Trade Organisation – WTO

In spite of its global nature, shipping is not completely bound by the WTO's service agreement (GATS). The liberalisation of shipping is part of the ongoing Doha negotiations.³⁸

In principle, shipping is covered by the general provisions of GATS. However, the central principle of most-favoured-nation treatment, which ensures that all WTO countries are treated equally, has been suspended in the shipping sector. The principle of non-discrimination and most-favoured-nation treatment therefore applies only between those countries that have made

³⁵ St.prp. nr. 73 (2007–2008).

³⁶ The ITF is a global amalgamation of trade unions within the transport sector. The ITF represents 4.6 million transport workers in 154 countries. There are 600,000 seafarers affiliated to the ITF (<http://www.itfglobal.org/about-us/moreabout.cfm>).

³⁷ When the new convention comes into force, this will be a task for national authorities such as Ship Control.

³⁸ The negotiations commenced in Doha in Qatar in 2001.

commitments in the field of shipping. This means that, in practice, GATS is of little importance for the shipping sector (Ministry of Foreign Affairs webpages on the WTO negotiations).³⁹

3.3 The EU regulatory framework

The plans to develop the EU's internal market put shipping on the EU agenda in earnest. Through the development of a common regulatory framework, the basis has been laid for the EU countries to coordinate their positions and their action in international shipping bodies, particularly in the IMO.

EU law is binding for the member states and overrides national law in the event of conflict. The EU has endorsed the UN Convention on the Law of the Sea and thus it becomes part of EU law by virtue of the fact that it takes precedence over any legal instruments violating the convention.

The point of departure for the regulations, then, is the EU's internal market with its fourfold freedom: the free movement of goods, services, labour and capital. Norway, the EEA country, is included in the EU's internal market in the vast majority of areas and thus is affected by the regulatory framework for the internal market.⁴⁰ In general, there are heavy restrictions on what kinds of national regulation countries can introduce with regard to the free movement of services. Any regulation must be non-discriminating (as far as nationality is concerned), necessary (in relation to public order, security, health and the environment) and proportionate (not going farther than is necessary to achieve the objective). Non-discriminating restrictions can nevertheless be unlawful, unless they are justified by general considerations.⁴¹ Under the practice of the European Court of Justice, attending to or improving workers' pay and working conditions is accepted as a legitimate consideration, though there may be dispute with regard to how far-reaching the restrictions may be.⁴²

The free movement of labour is, as previously mentioned, one of the four fundamental rights within the EU's internal market, and it extends to seafarers too. Firstly it means the flag state cannot generally impose nationality requirements on seafarers.⁴³ This means, secondly, that the flag state

³⁹ http://www.regjeringen.no/nb/dep/ud/dok/andre/brev/prinsipputtalelser_og_fortolkninger/2002/tjenesteforhandlingene-i-wto---norges-bi.html?id=271583.

⁴⁰ Exceptions for agriculture and fishing (own agreements).

⁴¹ The European Court of Justice has a long list of what are regarded as compelling general considerations: public order, health and security, maintaining social order, socio-political objectives, consumer protection, worker protection, animal welfare, the financial balance of social security systems, the prevention of fraud, unfair competition, environmental protection, etc.

⁴² In the debate on the free movement of services, the distinction may also be drawn between the movement of services and the freedom of establishment. It can sometimes be difficult to draw the distinction, i.e. to draw the line as regards when a service is so well established that it may be regarded as an establishment. In several rulings, the European Court has declared that the concept of establishment is broad and involves a citizen's participating, in a stable and lasting way, in the economy of another member state (Sejersted et al. 2005). Drawing the line between the freedom of establishment and the protection of workers' rights is discussed, for instance, in the so-called Viking Case (C-438/05), which related to the outflagging of a ferry from Finland to Estonia.

⁴³ It is possible to make exceptions from the nationality requirement as far as officers are concerned – for security reasons, for instance.

must treat seafarers from other member states the same way as workers from the flag state (Björkholm 2007).

The free movement of services involves the free right to maritime transport. This applies to transport between ports in the member states and to and from third-party states (inclusive of offshore facilities)⁴⁴ and between ports in one and the same member state (so-called cabotage).⁴⁵ The EEA Agreement also means that tendering arrangements in domestic trade will be open to shipping companies, ships and seafarers from other EEA countries. In general, the EEA Agreement does not apply to the Continental Shelf.

In this context, it is the particular relationship between free movement and regulation of the maritime labour market that will be of interest. Björkholm (2007) argues that the protection of navigation workers is closely related to maritime safety. A crew without acceptable social conditions on board may pose a greater threat to maritime safety than crews with working conditions that provide for occupational safety and well-being on board.

Numerous regulations have been compiled with which EU member states must comply. The following are among the central directives:

- The EU Directive on Port State Control (1995/21/EC), which gives states the opportunity to inspect vessels coming into port, with regard, among other things, to working and social conditions, is consistent with the international regulatory framework
- Directive 2005/45/EC, which establishes, among other things, that member states must *as a matter of course* recognise STCW certificates issued by a member state to citizens and non-citizens of member states. Seafarers with such certificates shall be able to serve aboard ships flying any of the flags of the member states.
- Directive 2008/106/EC, which brings together the valid directives on minimum requirements for seafarers' levels of training. The Directive on the Mutual Recognition of Qualifications (2005/36/EC) regulates recourse to special national requirements.⁴⁶
- The directive on the enforcement of and compliance with the ILO standards for working hours (1999/95/EC). This directive came into being as a result of an agreement between employers' and employees' organisations on the European level.⁴⁷

There is currently a proposal, under consideration in the EU's institutions, for a directive on the regulation of the conditions for employees aboard passenger ships and ferries sailing between EU countries.⁴⁸

⁴⁴ See Council Regulation (EEC) No. 4055/86 and Ot.prp. nr. 62 (1991–92) Om lov om utveksling av tjenesteytelser innen sjøtransport mellom stater tilsluttet Det europeiske økonomiske samarbeidsområde, og mellom stater tilsluttet Det europeiske økonomiske samarbeidsområde og tredjeland, mv.

⁴⁵ Read more about the Cabotage Regulation, Council regulation (EEC) No. 3577/92, in the next section.

⁴⁶ Norway has special national requirements for ships' cooks, platform managers, stability section managers, control room operators, technical section leaders and assistant technical section leaders.

⁴⁷ The European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union.

⁴⁸ COM(00) 0437 Endret forslag til direktiv om regulering av vilkårene for ansatte om bord på passasjerskip og ferger som går mellom EU-land. <http://www.regjeringen.no/nb/sub/europaportalen/eos-og-efta/eos/aktuelt/rettsakter/> 6 January 2010.

The EU Directive on the Posting of Workers (1996/71/EC) has a double objective. It is intended to ensure both the free movement of services between member states and that workers serving in other member states enjoy the same fundamental pay and working conditions as workers in the host country. Seafarers in the merchant fleet are excluded from the provisions of the Posting Directive. This is related, among other things, to the flag state principle. With regard to the areas covered by Norwegian working environment legislation, however, the Posting Directive does in fact apply. This is a matter of operations at permanently stationed and portable and mobile installations engaged in the petroleum business.⁴⁹

The EU Services Directive, the aim of which is to achieve freer movement of services and make it easier to set up in business across national borders, does not apply to the merchant fleet either.⁵⁰

Cabotage Regulation

International cabotage rights exist when a transporter from one state has the right to engage in transport between two points in the territory of another state. Norway has for a long time practised free international maritime cabotage in Norwegian waters. Ships under flags of all kinds (with the exception of NIS) have, therefore, been able to engage in transport between Norwegian ports.

In 1992 the EU adopted regulations for free cabotage in internal maritime transport within the EU.⁵¹ The regulations were brought into effect in Norway from 1998, as they were regarded as relevant to the EEA. Permission to carry out cabotage in another member state requires that a vessel be allowed to carry out cabotage in its own country.⁵² In addition to the Cabotage Regulation itself, for Norway's part a statement has been issued that attests that Norway does not intend to make amendments to the NIS Act as regards the authority of NIS-registered ships to engage in Norway's coasting trade.⁵³

Under the EU regulation, maritime cabotage also encompasses offshore supply services, i.e. the maritime transport of passengers and goods between any port in a member state and installations or facilities on the continental shelf of this member state.⁵⁴

⁴⁹ Ot.prp. nr. 13 (1999–2000). Om lov om endringer i lov 4. februar 1977 nr. 4 om arbeidervern og arbeidsmiljø m.v. (arbeidsmiljøloven) og lov 4. juni 1993 nr. 58 om allmenngjøring av tariffavtaler m.v. (allmenngjøringsloven).

⁵⁰ The entire transport sector, including port services, is excluded from the scope of the Services Directive.

⁵¹ In land transport, on the other hand, generally there is no free cabotage in the EEA, aside from a few exceptions.

⁵² See Council Regulation (EEC) No. 3577/92, Article 1.

⁵³ See Ot.prp. nr. 39 (1997–1998) Om lov om endringer i lov 4. desember 1992 nr 121 om fri utveksling av tjenesteytelser innen sjøtransporten mellom stater tilsluttet Det europeiske økonomiske samarbeidsområde og mellom stater tilsluttet Det europeiske økonomiske samarbeidsområde og tredjeland, og om endring i visse andre lover som følge av avtalen om Det europeiske økonomiske samarbeidsområde (innlemmelse av EØS-komiteens beslutning nr 70/97 av 4. oktober 1997 om å innlemme rådsforordning (EØF) 3577/92 om anvendelse av prinsippet om adgang til å yte tjenester innen sjøtransport i medlemslandene i EØS avtalens Vedlegg XIII). (<http://websir.lovdato.no/cgi-lex/wifftrens?0/lex/otprp/htprp-199798-039.html>)

⁵⁴ See Council Regulation (EEC) No. 3577/92, Article 2(b).

The incorporation of the Cabotage Regulation in Norwegian law means that NOR ships (which are allowed to engage in cabotage in Norway) may also engage in maritime cabotage in the other EEA countries.⁵⁵ There are also numerous bilateral agreements between Norway and EU countries (Sweden, Finland, Denmark, Germany and the United Kingdom, for example)⁵⁶ that mean that, in practice, NIS-registered ships have the opportunity to engage in cabotage in these countries.

In general, all issues relating to the crew shall be the responsibility of the flag state. For vessels under 650gt, however, exceptions can be made. Furthermore, exceptions can be made for island cabotage. In the Cabotage Regulation, Article 3, Clauses 1–3, it says⁵⁷:

1. For vessels carrying out mainland cabotage and for cruise liners, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag state), except for ships smaller than 650gt, where host State conditions may be applied.
2. For vessels carrying out island cabotage, all matters relating to manning shall be the responsibility of the State in which the vessel is performing a maritime transport service (host State).
3. However, from 1 January 1999, for cargo vessels over 650gt carrying out island cabotage, when the voyage concerned follows or precedes a voyage to or from another State, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State).

With regard to island cabotage for vessels under 650gt, it says in the EU's interpretation of the provisions (COM 2003:595) that the host state may set the minimum wage:

Member States may also require the seafarers on board to have social insurance cover in the European Union. In terms of working conditions, they may impose the minimum wage rules in force in the country.

For Norway's part, the Maritime Directorate's figures show that it is, in particular, cargo ships and passenger ships in domestic trade that are under 650gt (one hundred ships under 650gt and fifty

⁵⁵ Ships registered in the Kerguelen Islands, the Netherland Antilles, the Isle of Man, Bermuda or the Cayman Islands are not affected by the Cabotage Regulation.

⁵⁶ See St.prp. nr. 46 (1997–98), Om samtykke til godkjenning av EØS-komiteens beslutning nr. 70/97 av 4. oktober 1997 om endring av EØS-avtalen vedlegg XIII (Transport).

⁵⁷ There has been some discussion about how this provision should be interpreted in order to avoid abuse. In COM (2009) final, the following is reported: 'Asked for a preliminary ruling, the Court also provided further clarification on the definition of the "voyage which follows or precedes the cabotage voyage" as referred to in Article 3(3) of the Regulation. According to the Court, this voyage means in principle any voyage to or from another State, whether or not the vessel has cargo on board. However, sham voyages without cargo on board, carried out to circumvent the Regulation, cannot be permitted. Such an abuse can be found to exist only if, first, notwithstanding that technically the conditions laid down by Article 3(3) apply, the result of the international voyage in ballast is that the shipowner benefits, in respect of all matters relating to manning, from the application of the law of the flag State, frustrating the aim of Article 3(2) of the Regulation, which is to allow the application of the law of the host State to all matters relating to manning in the case of island cabotage. Second, there must also be objective evidence to show that the essential aim of the international voyage in ballast is to avoid the application of Article 3(2) in favour of Article 3(3).' Judgment of the Court of 21 October 2004. *Commission of the European Communities v Hellenic Republic*. (Case C–288/02). ECR 2004, p. I–10071.

ships over 650gt, as registered in NOR).⁵⁸ The directorate does not survey the numbers of ships engaging in the supply trade between mainland Norwegian ports and Norwegian installations on the Continental Shelf. In the database, however, there are 154 supply ships/stand-by vessels in NOR, of which only three have gross tonnages below 650gt (Maritime Directorate survey, March 2010).

In addition, the Cabotage Regulation includes provisions to the effect that a member state may conclude contracts for public services with shipping companies engaging in regular navigation to, from and between islands.⁵⁹ The Commission applies the principle that a fjord crossing falls under island cabotage when a diversion by land would be more than 100km long.⁶⁰ Article 4 reads as follows:

1. A Member State may conclude public service contracts with or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating in regular services to, from and between islands.

Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners.

2. In imposing public service obligations, Member States shall be limited to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel.

Where applicable, any compensation for public service obligations must be available to all Community shipowners.

3. Existing public service contracts may remain in force up to the expiry date of the relevant contract.

The Cabotage Regulation, then, regulates various kinds of cabotage. Firstly this applies to ‘mainland cabotage’, where this term refers to carrying passengers and goods from one mainland port to another mainland port in the same coastal state. Secondly there is ‘island cabotage’, where this term refers to carrying passengers and goods from a mainland port to one or more islands, or to traffic between islands in the same state. As far as island cabotage is concerned, the distinction can in turn be made between vessels that operate on a commercial basis and vessels that are subsidised in accordance with public service contracts (PSCs). Thirdly, there are offshore supply services: maritime transport of passengers and goods between any port in a member state and installations or facilities on the continental shelf of this member state.

⁵⁸ Ships in NOR that are certified for foreign trade may also carry cargo between Norwegian ports, but the Maritime Directorate has no overview of this.

⁵⁹ See Council Regulation (EEC) No. 3577/92, Article 4.

⁶⁰ In Ot.prp. nr. 60 (2008–2009), under Item 3.2.2, ‘The relationship to the regulation on maritime cabotage’, it says: ‘In the Commission’s Interpretation Statement, COM(2003)595 final, under the item on public services (see Item 5.1 in the Interpretation Statement), the Commission laid down the basis that a fjord crossing also fell under the concept of island cabotage when a diversion by land would be more than 100km long also. Though it may not be mentioned particularly in the Commission’s Interpretation Statement, there are good grounds to take the same understanding as a foundation with regard to the host state’s right to set regulations with respect to crews employed on vessels performing public services.’ (Translated from Norwegian)

Questions may be asked about the reach of the Cabotage Regulation's provisions to the effect that 'all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag state)'. Often the term 'manning' is used only in connection with manning issues linked to safety on board, whereas reference is seldom made to pay conditions. This is especially relevant when a ship sails in regular domestic traffic. Here the way seems to be open for various interpretations of the Cabotage Regulation. In the European Commission's last review of the implementation of the regulation⁶¹, it is reported, for example, that France, Greece, Italy, Portugal and Spain require ships in cabotage traffic to comply with local minimum-wage requirements⁶², but the review does not explicitly discuss this as a problem.

3.4 What room is there for national action?

International regulation of shipping limits the Norwegian authorities' room for action. The relationship between the flag state principle and coastal-state jurisdiction is central to this problem. However, the requirements resulting from the Convention on the Law of the Sea apply first and foremost to ships in 'passage'⁶³. As long as a vessel is using Norwegian ports, this is no longer regarded as 'passage', and the state's room for action is thus considerably greater. An example that describes four different situations can throw some light on this. 1) When a Russian ship sails along the coast of Norway, from Murmansk to Hamburg, this is regarded as 'passage' through Norwegian territorial waters, and the flag state's (i.e. Russia's) regulatory framework on pay and working conditions categorically applies aboard the ship. 2) If this Russian ship sails between Murmansk and Bergen, the port authorities in Bergen may, in line with the port state's jurisdiction, monitor whether the ship complies with international conventions. 3) If this Russian ship engages in regular domestic trade between Bergen and Stavanger, the coastal state's jurisdiction applies and the Norwegian authorities may regulate pay and working conditions aboard the ship. 4) If the ship engages in regular domestic trade between Bergen and the Gullfaks Oil Field, the ship will cross the boundary of the coastal state's jurisdiction around 12 nautical miles off the coast. Because this is a matter of shipping linked to Norwegian offshore operations, however, it is reasonable to treat this traffic as domestic traffic, as does in fact happen in the NIS Act and the EU Cabotage Regulation.

⁶¹ COM (2009) 3577/92 final, Annex 1: Rules on manning adopted in accordance with Article 3 of the Regulation.

⁶² In France, Italy and Spain, all ships must, in addition to this, accommodate local regulations on working hours.

⁶³ UNCLOS, Article 18 refers to 'passage' as follows:

'1. Passage means navigation through the territorial sea for the purpose of:

- (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
- (b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.'

In addition, Norway is bound by the EU regulatory framework via the EEA Agreement, which means that ships registered in EU member states must be treated on the same terms as vessels registered in NOR. The prohibition of discrimination also applies to workers from EU member states. As a result of the EU Cabotage Regulation, all issues relating to manning shall be the responsibility of the flag state. The Cabotage Regulation offers the option of exemptions for ships under 650gt and for island cabotage but so far such exemptions have not been implemented in Norwegian law. There is also room for different interpretations of what the phrase ‘all issues relating to manning’ implies, as several EU countries have, for example, introduced minimum-wage requirements in domestic trade. Norway does not have minimum-wage regulations aside from the areas covered by generalised collective agreements. If general application were to be considered for cabotage, as stated above, then the Act on General Application of Collective Agreements would have to be amended. (Read more about this in Chapters 4 and 5.)

3.5 Regulatory frameworks in other shipping nations

As we discussed earlier, in principle there is no obstacle in international law to a coastal state’s imposing regulations in its own territorial waters, with the exception of the restrictions relating to ships in ‘passage’. However, bilateral or multilateral agreements may exist that give the parties the option of engaging in one another’s domestic traffic. Under the EU Cabotage Regulation, for example, shipping companies in the member states can now freely pursue reciprocal cabotage operations.

Coastal states around the world are taking up various regulations to support their own shipowners or seafarers in domestic trade. Among others, these can be:

- restrictions with regard to where the ships must be registered
- restrictions with regard to the crews’ nationalities and working conditions
- financial subsidy schemes for the coastal states’ own citizens (shipowners and/or seafarers)

Below, we shall give some examples of how different shipping nations arrange their affairs as regards protecting their own seafarers and in order to prevent downsizing of their national fleets.

Cabotage regulations in the EEA

In spite of the Cabotage Regulation, which allows the member states to engage in one another’s domestic traffic, EEA countries may apply restrictions to such traffic with respect to countries outside the EEA. Cabotage regulations also allow national authorities the option of giving priority to their own ships or local crews when the ships are under 650gt or engage in island cabotage.

At regular intervals, the European Commission reports on how the implementation of the Cabotage Regulation is going. The account in the rest of this section is based on two such reports.⁶⁴

In the report for the period of 1999–2000, the Commission points out that ships registered in the Danish International Register or the Italian International Register cannot engage in domestic trade in EU countries, because they are not allowed to engage in such trade in their own countries. In the

⁶⁴ COM (2002) 203 final and COM (2009) final.

five southernmost member states (France, Greece, Italy, Portugal and Spain), island cabotage constituted, on average, almost two-thirds of all carrying trade. It also emerges from this report that ships registered in one EU country do not engage in cabotage in other EU countries very much.⁶⁵ France had taken advantage of the option of letting national regulations apply to ships under 650gt. Similarly, Portugal had made exceptions for other countries' ships in island cabotage.

Although EU-registered ships did not engage in one another's traffic very much, some countries had a number of foreign ships in domestic traffic, i.e. ships registered in countries outside the EEA. This was the case, for example, in the Republic of Ireland, Germany, the United Kingdom and Sweden. The proportion of foreign ships varied from one country to another.⁶⁶ However, a number of countries (Finland and Italy, for example) applied restrictions for ships listed in the registers of third-party states as far as domestic trade was concerned.

Nor could the Commission's report for the period of 2001–2005 confirm that ships registered in one EEA country were engaging in cabotage traffic in other EEA countries any more than before as a result of the Cabotage Regulation. The only exceptions were Finland and Sweden, which saw increases in traffic from other EU countries.

In Germany it is usually only ships covered by the Cabotage Regulation that may engage in domestic trade, whereas ships registered in third-party states' registers must have special permission. Similar provisions apply in France, Italy, Malta, Poland, Portugal, Spain and Sweden. The largest proportion of ships under flags of third-party states was in the UK (50 per cent). The Commission points out that it has been difficult to draft a complete report, because the statistical basis is unreliable and inadequate.⁶⁷

Cabotage regulations in third-party states

The ITF has identified at least thirty seafaring nations in the world (excluding Europe) that apply regulatory frameworks of various kinds to cabotage in order to protect their own shipbuilding, their own shipowners or local seafarers. The regulations vary a great deal, and discriminating cabotage regulations are most conspicuous in North, South and Central America and South, East and South-East Asia.

In a comparison of Argentina, Brazil, Canada, Chile, Colombia, the Philippines, Japan, Mexico, Peru, Thailand, Turkey, Uruguay and the USA, among others, the ITF finds that most of these countries require ships engaging in domestic trade to be registered under the flags of these respective countries and/or to have crews from them (see Table 3.1). The systems vary as regards how strict the conditions are. In the USA, ships that are to engage in domestic trade must be US

⁶⁵ The United Kingdom had the most freight but Greece had the most passenger traffic. This tallies with the respective facts that the UK is an oil-producing nation with a lot of trade between the mainland and installations on the Continental Shelf and that Greece comprises many inhabited islands. The report compares wage costs and finds that the highest costs fell to ships registered in Finland and the lowest to ships registered in the Portuguese register MAR (stands for Madeira).

⁶⁶ In the Republic of Ireland, which did not have restrictions, for example, only 5 per cent of ships in domestic traffic sailed under the flag of the Republic.

⁶⁷ 'Concerning the market developments in the period of reference, it must be highlighted that the Commission encountered difficulties in collecting the data needed to draw up this part of report since the statistical system used to track maritime cabotage is becoming increasingly insufficient and unreliable. As it was pointed out in the previous cabotage report, the Member States no longer collect such detailed statistics as in the past. Given that the market has been liberalized, the competent authorities pass the responsibility of recording data to the open market.'

owned, built and repaired at US shipyards and have mainly US crews.⁶⁸ Japan too has relatively strict regulations: for example, ships carrying goods or passengers domestically must be registered under the flag of Japan. Foreign-registered vessels do have very limited access, if bilateral agreements are in place.

In Australia, which has some of the most liberal cabotage regulations in the world, there is nevertheless the requirement that seafarers aboard foreign-registered vessels in domestic trade enjoy the same pay and working conditions as those on Australian ships. Foreign-registered ships that receive subsidies in their home countries may not engage in Australian cabotage traffic.⁶⁹

Though many countries have cabotage regulations that favour their own shipping companies and seafarers, very few have big enough fleets of their own to provide all domestic transport services. In particular, there is the matter here of sufficient availability of supply vessels in the offshore sector, tankers, seismic research vessels and the like. Thus exceptions may now and again be made, for example when foreign-registered ships obtain temporary permits to engage in cabotage traffic. A few countries establish separate registers for foreign-controlled ships that have temporary permits to engage in cabotage.

In some countries, foreign-controlled ships that are to engage in other countries' domestic traffic must temporarily swap flags. Brazil, Ecuador, Mexico and Peru, for example, are countries that offer to hire ships for cabotage once the ships have been registered under these countries' respective national flags.

As we see from Table 3.1, many of the major flag states have restrictions on who may register their ships there. When the ownership of a ship is personal, there is often the requirement that the owner(s) have permanent residence. On the other hand, when a shipping company stands as the owner of a ship, it is usually enough for the shipping company to be legally registered in the country. The regulations vary as regards the restrictions on direct foreign investment. In Japan, for example, financing a ship by means of foreign capital is not allowed, whereas Australia, Canada and Brazil have no such restriction.

⁶⁸ Affirmed in the 1920 Merchant Maritime Act (the so-called Jones Act).

⁶⁹ 'Cabotage in Australia under the Navigation Act. The Navigation Act requires all shipping engaged in the coasting trade to be either licensed or to be granted specific exemptions from the licensing requirements in the form of single or continuous voyage permits (SVPs or CVPs). Any ship, whether Australian or foreign, can obtain a license to operate on the coast provided certain economic conditions are met, as set out in Part VI of the Act, which are principally:

- a) that seafarers employed on the ship shall be paid wages at the current rates ruling in Australia, and
- b) that the ship is not in receipt, either directly or indirectly, of any subsidy or bonus from a foreign government.'

Information from the Australian Shipowners Association (<http://www.asa.com.au/industrypolicy.asp>) on 15 February 2010.

Table 3.1: Summary of restrictions on domestic trade in a selection of nations

Country	Crew restrictions on the ability to engage in cabotage	Flag affiliation restrictions for ships that will engage in cabotage	Ownership restrictions on the ability to register in the flag state
Argentina	Foreign-registered ships may only have Argentine crews	Only ships under the flag of Argentina	A ship must be owned by a permanent resident of Argentina, by a company established in Argentina and registered in the National Shipowners' Register, or by a company that has concluded a contract with an Argentine shipyard
Brazil	Officers and two-thirds of the crew on any ship registered in Brazil must be Brazilian	Brazilian ships must be registered in the Registry of Maritime Property or in the Special Brazilian Registry (REB)	A ship must be operated by a Brazilian citizen or by a Brazilian shipping company (an EBN). No restriction on national origin of capital.
Canada	Canadian officers and Canadian crews required	Only ships under the flag of Canada	A ship must be owned by a permanent resident of Canada or by a Canadian company. A foreign shipping company may register a ship as long as the ship is not registered elsewhere and as long as a subsidiary has been established in Canada.
Chile	Chilean crews required (100 per cent)	Only ships under the flag of Chile	Residents of Chile or companies registered in the country may operate ships under the flag of Chile. Among other things, more than half of the capital in ships owned by foreigners must belong to Chileans.
Colombia	The captain, the officers and 80 per cent of the crew must be Colombian	Only ships under the flag of Colombia	Residents of Colombia or companies registered in the country may operate ships under the flag of Colombia
Philippines	Filipino crews required	Only ships under the flag of the Philippines	Filipinos or companies registered in the country can operate ships under the flag of the Philippines. The maximum proportion of foreign capital is 40 per cent.

Japan	Japanese crews required (100 per cent)	Only ships under the flag of Japan, unless there are bilateral agreements	Foreign capital generally forbidden. Some exceptions.
Mexico	Mexican crews	Only ships under the flag of Mexico	The shipowners must be Mexican
Thailand	At least 50 per cent are required to be Thai	Only ships under the flag of Thailand	Thais or companies registered in the country may operate ships under the flag of Thailand. The maximum proportion of foreign capital is 30 per cent.
Turkey	Crews must be Turkish	Only ships under the flag of Turkey	For a ship to be able to sail under the flag of Turkey, the shipping company must be at least 51-per cent Turkish owned. In addition to this, Turks must make up the majority of the board.
Uruguay	At least 50 per cent of the crew (including the captain) must be from Uruguay	Only ships under the flag of Uruguay	For a ship to be able to sail under the flag of Uruguay, the shipping company must be at least 51-per cent Uruguayan owned. In addition to this, Uruguayans must make up the majority of the board. Alternatively, the ship may be owned and run by Uruguayan citizens.
USA	At least 75 per cent of the crew must be US citizens	Only ships under the flag of the USA, registered and built in the USA and owned by US shipping companies	Any ship must be owned by a US shipping company and the shipping company must not be more than 25-per cent foreign owned

Source: ITF, based on individual WTO national reports for 2001–2008

4 National domestic trade arrangements

In this chapter, we shall look more closely at various laws with corresponding regulations that govern pay and working conditions for foreign labour in Norwegian domestic trade. The Immigration Act and the Act on General Application of Collective Agreement are central laws. We also describe two subsidy schemes intended to promote the employment of Norwegian seafarers. Such schemes are particularly important for small shipping companies operating in the carrying trade on the coast.

4.1 What is regarded as domestic trade?

The EU defines ‘domestic trade’ as sailing in marine areas from one port in a member state to another port in the same member state (Directive 1999/35). In the EU regulatory framework, offshore installations are dealt with on the same terms as ‘ports in a member state’ (see for example the Cabotage Regulation discussed above). We can draw a distinction between the three following forms of domestic trade:

- Carrying cargo and passengers between ports in mainland Norway and oil and gas enterprises on the Norwegian Continental Shelf (‘the supply market’). The supply ships are listed in NOR or in foreign registers and the Norwegian shipowners are usually members of the Norwegian Shipowners’ Association.
- Carrying cargo along the coast. The ships are mainly registered in NOR, but some are listed in NIS or in foreign registers as well. Most of the shipping companies owning these ships are members of the Association of Cargo Freighters (FR). As of January 2010, there were 264 vessels and 127 shipping companies registered with FR. These are ships engaging in goods transport, a few tugs and patrol boats. No supply ship is registered with this association. According to FR, most of the vessels are relatively small, with small crews. The seafarers live in close proximity to one another when they are on board and therefore the skippers generally want Norwegian crews. This is a coastal industry, with small shipping companies. In many respects, it may be regarded as a land-based regional industry. Often the skipper and the owner are the same person. The skipper generally employs people from his own community. Common culture and language play an important role here.⁷⁰
- Domestic passenger traffic (ferries and express boats). The ships are registered in NOR and the shipping companies are members of the Federation of Norwegian Coastal Shipping (RLF). RLF is mainly the union for domestic ferry traffic and most of the tug companies. All the ferries are registered in NOR, whereas there are some tug companies that have registered a few vessels in the Norwegian or Danish registers.⁷¹ Ferry traffic is subject to the Public/Commercial Transport Act⁷² along with its regulations. The state and the county councils put ferry traffic out to tender.

⁷⁰ The information is based on an interview with Siri Hatland and Toril Vik Veland at the Norwegian Association of Cargo Freighters on 11 January 2010.

⁷¹ The information is based on a telephone conversation with Harald Thomassen at the Federation of Norwegian Coastal Shipping on 14 January 2010.

⁷² LOV 2002-06-21 nr 45: Lov om yrkestransport med motorvogn og fartøy (yrkestransportlova).

Any party intending to compete for a tender must commit to pursue pay and working conditions for operating personnel that at least conform to one of the nationwide collective agreements. Corresponding obligations apply with respect to workers employed by subcontractors. Crews are required to have a command of Norwegian or another Scandinavian language. According to RLF, it is mainly Norwegians who are employed on the ferries.

The debate on equal conditions for foreign and Norwegian seafarers in domestic trade seems, then, to be particularly relevant to Norwegian- and foreign-registered ships in the supply trade and to foreign-registered ships in the coasting/carrying trade.

4.2 Immigration Act

As a result of an amendment to the former immigration regulation, enacted in 2005 (under Prime Minister Kjell Magne Bondevik's second administration), the provisions on residence and work permits were no longer to apply to foreign seafarers on foreign-registered ships in domestic trade. In the Red-Green government's action plan against 'social dumping'⁷³, the case was made for reintroducing the requirement for work and residence permits for foreign seafarers on ships carrying goods and passengers between Norwegian ports under foreign flags. This work should also be viewed in connection with the newly adopted ILO Convention No. 180 on seafarers' working and living conditions.

Under the new Immigration Act, which came into force on 1 January 2010,⁷⁴ workers from outside the EEA (citizens of third-party states) who are to work for employers in the Kingdom of Norway must have Norwegian residence permits. The act also extends to ships in domestic trade as well as to installations and facilities used on or connected to Norway's part of the Continental Shelf. In general the act does not apply to Norwegian ships in foreign trade⁷⁵, but §§5–6 read: 'The king may introduce into the regulation further rules with regard to when the act or rules issued in pursuance of the act may be applied to Norwegian ships engaging in foreign trade that call in at Norwegian ports'.

Furthermore, in the Immigration Regulation, exceptions are made for seafarers working aboard foreign-registered cruise ships or foreign ships listed in shipping registers in the EEA countries.⁷⁶ All the same, seafarers working aboard a foreign-registered ship (from outside the EEA) that takes

⁷³ See St.meld. nr. 2 (2005–2006), Revidert nasjonalbudsjett 2006.

⁷⁴ Lov 2008-05-15 nr 35 Lov om utlendingers adgang til riket og deres opphold her (Utlendingsloven).

⁷⁵ 'Norwegian fishing vessels that land their catches in Norwegian ports are not regarded as engaging in foreign trade. Apart from this, Norwegian ships are not regarded as engaging in foreign trade when they take goods or passengers aboard at a Norwegian port and deliver the goods or set the passengers ashore at another Norwegian port. All the same, this does not apply to ships covered by the regulation on the expanded area of trade for cargo ships registered in the Norwegian International Ship Register (NIS), affirmed by Royal Resolution 89-08-11 nr 802, nor ships covered by §3, Par. 2 of FOR 87-06-30 nr 579 om særskilt fartsområde for fartøyer og flyttbare innretninger i petroleumsvirksomhet registrert i norsk internasjonalt skipsregister.' FOR 2009-10-15 nr 1286: Forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften), §1(16). (Translated from Norwegian)

⁷⁶ FOR 2009-10-15 nr 1286: Forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften), §1(1). Seafarers covered by bilateral navigation agreements are also exempt from the requirement for residence permits. Currently the list of such agreements is blank.

goods or passengers aboard in one Norwegian port and delivers the goods or sets the passengers ashore in another Norwegian port must apply for residence permits. These regulations mean, for example, that Filipino seafarers on a vessel registered in Liberia must have residence permits to engage in Norwegian domestic trade, whereas Filipino seafarers on a vessel registered in Cyprus need not have such permits – even if the Filipino seafarers are employed on exactly the same terms on the Liberian ship as on the Cypriot ship. This illustrates the distinction in the regulatory framework between ships from inside the EEA and ships from outside it.

According to the Immigration Regulation, §6(6), the regulation applies to ‘ships that participate in regular or substantial activity between Norwegian ports, but not to ships that only occasionally participate in such activity’. The regulation applies with effect from 1 May 2010. The question, then, is what is regarded as regular or substantial activity. The Ministry of Labour and Social Inclusion has defined it as follows⁷⁷: ‘Regular or substantial activity between Norwegian ports will be activity for a continuous three-month period. There may be up to two short one-way journeys or commissions to other countries, with a total duration of under ten days, without interruption of the period.’⁷⁸ For the moment, the Immigration Regulation, §6(6) does not apply to maritime transport of passengers or goods between mainland Norwegian ports and installations or facilities on the Norwegian Continental Shelf. The question whether to extend the Immigration Regulation’s area of application in order to cover such transport as well is under consideration.⁷⁹

Under the Immigration Act, §23, there are several conditions that must be met in order for a residence permit to be issued: the pay and working conditions, for instance, must be good enough to comply with the relevant collective agreement or wage scale for the industry. ‘If no such collective agreement or wage scale exists, the pay and working conditions must not be worse than is normal for the place and profession concerned.’

4.3 General application of collective agreements

The aim of the Act on General Application of Collective Agreements⁸⁰ that came into force in 1994 is ‘to assure foreign workers pay and working conditions that are equal to the conditions Norwegian workers enjoy, as well as to hinder the distortion of competition to the disadvantage of Norway’s

⁷⁷ Cf. the directive, dated 14 December 2009, from the Ministry of Labour and Social Inclusion to the Norwegian Directorate of Immigration, on laying down guidelines in accordance with the Immigration Regulation, §6(6), Par. 2.

⁷⁸ To be able to work on a Norwegian or foreign permanent installation used on the Norwegian part of the Continental Shelf, a citizen of a third-party state must have a residence permit. Residence permits may be issued to trained specialists and must be linked to the relevant jobs. Foreigners intending to take up work on portable installations used on the Norwegian part of the Continental Shelf are exempt from the residence permit requirement in the law as regards work and residence on the installations. For portable installations linked to permanent installations, and portable installations that have made the transition into the permanent-production stage, the provisions on permanent installations apply – see the Immigration Regulation, §§1(10) and 1(11).

⁷⁹ Information from a Ministry of Foreign Affairs email, 1 March 2010.

⁸⁰ Lov 4. juni 1993 nr. 58 om allmenngjøring av tariffavtaler m. v.

labour market'.⁸¹ In practice, among other things, this involves introducing a fixed-term official minimum-wage requirement in the industries and fields concerned. A generalised collective agreement is valid for everyone working in the area of the generalisation, irrespective of nationality and forms of employment. LO first called for general application in the autumn of 2003. The first resolution passed by a state-appointed collective-agreement committee came into force on 1 December 2004 and extended to seven onshore petroleum facilities (the Building-Trade, Electrical-Trade and Metalworking Agreements). The following collective agreements have since been generalised: the Building-Trade Agreement (across the country), the Electrical-Trade Agreement (in Oslo and Akershus), the Metalworking Agreement (in the shipping and shipbuilding industries) and the Agreement for the Agricultural and Horticultural Industries (across the country) – see Andersen et al. (2009).

The Act on General Application extends to NOR-registered ships and portable installations under the flag of Norway but not to ships in NIS or ships registered elsewhere.⁸² The explanation that the draft bill gives for the exception for NIS-registered ships is that such ships are already ordered to maintain collective agreements with their employees. NOR does not include corresponding stipulations on collective agreements. 'The ministry therefore proposes that ships, mobile installations, drilling vessels, etc. listed in the Norwegian Ordinary Ship Register be covered by the law [...]'.⁸³

With regard to ships and portable installations flying foreign flags, the draft bill makes the distinction between ships engaging in foreign trade, portable installations operating in the petroleum business on the Norwegian Continental Shelf and ships engaging in the coasting trade along the Norwegian coast. Laying down pay and work requirements aboard foreign ships sailing to and from Norway in foreign trade could be considered a 'violation of Norwegian shipping policy, which is based, among other things, on the flag state principle and market access both at home and abroad. [...] The ministry will not, therefore, propose that such ships should be covered by the law'.⁸⁴ With regard to portable installations, the Ministry of Local Government says in the draft bill that 'the activity these vessels engage in has more in common with mainland entrepreneurial activity than with traditional shipping'. It was in this light that portable installations engaging in petroleum operations on the Norwegian Continental Shelf under foreign flags came to be covered by the Act on General Application.⁸⁵

⁸¹ The objects clause of the act was expanded in 2009, when the aim of preventing the distortion of competition was inserted into the text of the act itself.

⁸² With regard to the petroleum business, the Act on General Application, §2(3) reads as follows: 'The law extends to petroleum operations taking place in Norway's internal waters, in Norway's territorial sea and on the Norwegian part of the Continental Shelf, in relation to exploration, survey drilling, extraction, utilization and pipeline transport and installation used for such operations. With these restrictions, the law also applies to portable installations under foreign flags. The ministry may decide that the law must encompass petroleum operations taking place on another country's continental shelf under the flag of Norway, as well as vessels under foreign flags that engage in construction, pipe-laying or maintenance activity on the Norwegian Continental Shelf. The law is applicable to operations and installations, as mentioned in §3, Par. 1, in areas outside the Continental Shelf, as long as this follows from international law or a separate agreement with a foreign state.' (Translated from Norwegian)

⁸³ Ot.prp. nr. 26 (1992–93), Om lov om allmenngjøring av tariffavtaler m v., p. 18.

⁸⁴ Ibid.

⁸⁵ Ibid., pp. 18–19.

What, then, of ships engaging in the coasting trade under foreign flags? Here the ministry chooses to make an exception to the law, on the following grounds: 'For many years, ships under foreign flags have engaged in transport between Norwegian ports. The EEA Agreement does not involve any change in this situation.'⁸⁶

Table 4.1 provides a survey of various systems regulating pay and working conditions for citizens of third-party states in Norwegian domestic trade, i.e. citizens not covered by the EEA Agreement. The table shows how the impact of the regulatory framework varies, depending on where ships are registered.

⁸⁶ Ibid, p. 19.

Table 4.1: Summary of systems for the regulation of pay and working conditions for workers from third-party states (i.e. from countries outside the EEA) in Norwegian domestic trade

Regulatory framework	Ships registered in NIS	Ships registered in NOR	Ships listed in other EEA registers	Ships listed in registers of third-party states
Immigration Act §§23–24, prescribing equal pay and working conditions. Applies both to employees in Norway and to posted workers. Exceptions: when bilateral agreements are in place	Not covered	Covered	Exempt from the requirements	Covered
Act on General Application of Collective Agreements, §2(2)	Exempt from the requirements	Covered	Exempt from the requirements	Not covered

4.4 State subsidy schemes

In order to ‘safeguard Norwegian maritime competence and the recruitment of Norwegian seafarers, as well as to help Norwegian shipping companies to enjoy conditions that are competitive in comparison to the conditions in other countries’, the state gives subsidies to shipping companies for seafarers aboard Norwegian-registered ships covered by the Seamen’s Act.⁸⁷ There are two public subsidy schemes:

- A scheme for refunding a percentage share of the shipping company’s wage costs for certain groups of seafarers on the appropriate ships. The ships must be registered in NIS or NOR. ‘Wage costs’ means gross wages paid out to the seafarers. As of today, this refund scheme involves a 12-per cent refund of the wage costs for cargo ships, passenger ships and tugs not engaging in petroleum operations. A refund of 9.3 per cent is given for well boats and ships in the petroleum business.
- A net wage scheme that involves a shipping company’s receiving refunds corresponding to the sum of paid income tax, social security contributions and employer contributions for crews under the scheme. The net wage scheme extends to the crews covered by ships’ alarm instructions on
 - NOR-registered passenger ships (ferries) in foreign trade,

⁸⁷ See FOR 2005-12-21 nr 1720: Forskrift om forvaltning av tilskudd til sysselsetting av sjøfolk.

- NOR-registered ships engaging in petroleum operations (offshore vessels) and
- other vessels in NOR (cargo ships, well boats, passenger ships and tugs),

and to the minimum safe crews of cruise ships serving the stretch between Bergen and Kirkenes.

The refund that is set must fall within the bounds of the EU/EEA regulatory framework for state subsidies.⁸⁸ The net wage scheme works in such a way that the shipping company deducts tax and makes employer contributions in the usual way and these are paid to the Maritime Directorate. The shipping company then applies to the directorate to get the tax and contributions refunded. In practice, the shipping companies' wage costs are considerably lower this way than they would be otherwise, while the seafarers receive the usual net pay. According to the Norwegian Association of Cargo Freighters (FR), the scheme is of great importance in order that the shipping companies wishing to retain Norwegian seafarers on carrying craft may compete with ships registered in other countries (which are not covered by the scheme). Today the shipping companies have many officers who have gotten to know the ropes through training aboard the vessels. This is regarded as more positive than having all training happen in the classroom. FR is therefore keen that the net wage scheme should not be changed to cover officers only.

Seafarers who are residents of Norway or other EEA countries and are liable to pay tax or social security contributions to Norway are regarded as seamen eligible for refunds. For seafarers to be entitled to refunds, there is the requirement that pay and working conditions must be covered by a collective agreement with the seamen's unions.⁸⁹ A refund limit of 198,000 kroner per employee per year was introduced with effect from 1 July 2008.⁹⁰

⁸⁸ We have received information from the Norwegian Seamen's Association that net wage schemes exist in Denmark, Finland, France, Greece, Italy, the Netherlands, the UK, Sweden and Germany. We will not go into these schemes in more detail here.

⁸⁹ A key condition of joining the net wage scheme is that a shipping company take part in training measures for seafarers. This happens by means of payments to the Norwegian Maritime Competence Foundation, which issues subsidies for training positions and health and safety and environmental measures. The foundation collects moneys and administers it in a fund into which the shipping companies covered by the net wage scheme are obliged to make payments. The money must be used for competence-raising measures and recruitment drives in the maritime industries.

⁹⁰ <http://www.sdir.no/no/Sjofolk/Refusjonsordningene/>; <http://www.regjeringen.no/nb/dep/nhd/dok/regpubl/stprp/2008-2009/stprp-nr-1-20082009-/7/2/18.html?id=530237>.

5 Summary and discussion

Norway has free international maritime cabotage in Norwegian waters, i.e. transporters under foreign flags can engage in transport between two ports in Norway, and no requirement is imposed with regard to the seafarers' nationalities. Public regulation of working and pay conditions, however, has mainly been applied to ships listed in the Norwegian Ordinary Ship Register (NOR).

With the establishment of the Norwegian International Ship Register (NIS) in 1987, Norwegian shipping companies gained the opportunity to sail in foreign trade under the flag of Norway without paying the same wages as in domestic trade. NIS ships were excluded from the coasting trade and traffic to the Continental Shelf. In connection with the fact that EU Cabotage Regulation was implemented in Norwegian legislation in 1998, Norway declared that no amendment would be made to the NIS Act in this area. The EU regulatory framework for cabotage extends (in the same way as the NIS Act) to both the coasting trade and the traffic from mainland ports to installations on the Continental Shelf.

It may seem paradoxical that NIS-registered ships (with certain exceptions) are not permitted to engage in domestic trade when foreign-registered ships have such permission. In principle, NIS ships are kept out of domestic traffic because the shipowners have the potential to provide pay and working conditions different from those normal in domestic trade. However, foreign-registered ships too have had such potential to provide pay and working conditions different from those normal on NOR ships in Norwegian domestic traffic. By virtue of the new immigration regulations that come into force from 1 May 2010, the Norwegian authorities have agreed to regulate pay and working conditions with regard to ships in the registers of third-party states (ships registered under so-called flags of convenience, for example) where bilateral agreements ensuring reciprocal free traffic do not exist. This provision extends to ships engaging in regular or substantial activity between Norwegian ports. The Immigration Act's requirements for residence permits are so-called Norwegian pay and work requirements. The provision does not currently apply to transport between mainland Norwegian ports and installations on the Continental Shelf. Public regulation of pay and working conditions will, then, continue to be stricter for NOR ships engaging in traffic from mainland Norwegian ports to installations on the Norwegian Continental Shelf than for ships in other registers. Furthermore, public regulation of pay and working conditions in coastal traffic is stricter for NOR ships and ships in third-party states' registers than for ships in NIS and EEA registers.

The Immigration Act cannot be applied to EEA citizens.⁹¹ With respect to EEA citizens, requiring residence permits – under the corresponding Norwegian conditions – will be a restriction of the free movement of labour and thus unlawful under EU law. Norway, however, has in fact chosen to exempt ships registered in EEA countries from the immigration regulations. This provides incentives for Norwegian shipping companies wishing to circumvent the requirement for

⁹¹ After the waves of EU expansion in 2004 and 2007, so-called transitional regulations were applied. This meant that workers from the new EU countries did not have access to Norway's labour market. Citizens from ten of these countries had to have work permits to work in Norway, with the requirement for Norwegian pay and working conditions. The transitional period is now over, except for Bulgaria and Romania.

Norwegian pay and working conditions to register ships in other EEA countries if the ships are to engage in Norwegian domestic trade. When a ship is registered in another EEA country, both seafarers from the EEA and seafarers from third-party states (a Filipino working on a ship registered in Cyprus, for example) may work in Norwegian domestic trade without being affected by the requirement for residence permits. NOR-registered ships and ships registered in third-party states may thus be said to be met with discrimination in comparison to EEA-registered ships.

Legitimate worker protection or protectionism?

Could measures involving the requirement of equal pay and working conditions irrespective of a ship's flag affiliation and the seafarers' nationalities be seen as protectionist?

Protectionism is usually linked to a state's protection of domestic production – with customs barriers, for example. It can also involve one country's implementing measures that prevent workers and/or firms from other countries taking jobs or commissions, with the aim of protecting the one country's own workers and/or business.⁹²

To apply this to navigation: may it be referred to as protectionism if the local regulatory framework means shipping companies must pay foreign seafarers higher wages than they would otherwise? In the debate about what constitutes protectionism, firstly it seems important to distinguish between degrees of mobility in the services provided. Some services can be conveyed over long distances (Silja Line's booking office, for example, is located in the Baltic) and thus they can be provided where it costs the least. The provision of transport services for the domestic market must of necessity take place in Norway. Insofar as this takes place on a permanent basis, this service provision is part of – and affects competition in – Norway's labour market. It is reasonable, then, to expect those providing the services to maintain equal pay and working conditions irrespective of nationality, yet this does not deserve to be covered by the term 'protectionism'. Secondly, it has been generally accepted since the establishment of the ILO that labour is not an ordinary 'merchandise' and that every country has the right to regulate and protect the labour market.

What room is there for national action?

How much room for action do public authorities have if they wish to ensure that all seafarers in domestic trade enjoy equal pay and working conditions? The Convention on the Law of the Sea

⁹² It is not easy to distinguish between protectionism, in the form of trade barriers with regard to goods and services provided by workers on lower wages in another country, and measures that mean that the same foreign labour cannot produce the goods and services in Norway for homeland wages but must comply with Norwegian pay and working conditions. See for example Evju (2009:18–19): 'In international trade, the norm is that a state cannot prohibit the importation of goods and services from low-cost countries. Lower labour costs or poorer working conditions in the exporting country do not in themselves provide a legal basis for excluding its goods and services from the recipient country's domestic market. In that case, people might ask why it should be seen any differently if, instead of sending its goods, an exporter sends its workers to the recipient country to produce the goods or services there. When cheaper services can be performed across borders digitally, it becomes even harder to maintain that there is any real difference between these situations.' (Translated from Norwegian)

makes stipulations commanding coastal states not to involve themselves in the working conditions of seafarers aboard foreign ships ‘passing’ through their waters. Furthermore, a coastal state does not generally interfere with the practice of a flag state with regard to a ship sailing in traffic from a port in one state to a port in another state.⁹³ However, as far as domestic trade is concerned, it is normal for countries to work with measures to ensure equal conditions and, in some cases, even with discriminating measures with respect to seafarers or ships registered under other flags.⁹⁴ In principle, there is no obstacle in international law to a state’s imposing regulations in domestic trade, and many a seafaring nation applies such cabotage regulations, for example, when it demands that seafarers on foreign-registered ships receive the national minimum wage. Often, however, both traffic between countries and reciprocal cabotage are regulated by bilateral or multilateral agreements.⁹⁵

Norway has for a long time pursued an open policy with respect to seafarers and ships from other countries. The Norwegian Shipowners’ Association, which is the body for most of the shipping companies engaging in foreign trade, has been concerned that Norwegian ships may be met with protectionist measures abroad if Norway introduces its own protective measures. The association has to a great extent gained a hearing for this view.⁹⁶ However, we have not found any examples in which national protective measures or requirements with regard to pay and working conditions in coastal traffic in one shipping nation have been met with exclusive counter-measures from other shipping nations, nor has the Norwegian Shipowners’ Association been able to give us such examples. It goes without saying that this does not rule out the possibility that exclusive counter-measures may occur.

As far as EEA ships are concerned, Norway is bound, among other things, by the EEA Agreement (see Chapter 3). According to the European Court of Justice, it is principally the relationship between free movement and protection of workers within the EEA that must be considered, in addition to other relevant EU regulations. The fundamental point here is that ships registered in EEA countries must be treated on the same terms as ships registered in NOR. The same applies to workers from EEA countries. In the European Court, the designation ‘restriction’ is generally used with regard to the boundary between what is lawful and what is unlawful. That is to

⁹³ Vessels used to be described as floating parts of the terrestrial territory. This means that work carried out on board is treated as equal to work carried out in the country where a vessel is registered. Today the question of jurisdiction is more nuanced (Björkholm 2007). On the territory of a coastal or port state, certain limitations apply to the exclusive competence of the flag state, but in common-law terms, flag state competence is regarded as intact as far as so-called internal conditions aboard the vessels are concerned. In the context of labour law, the principle that it is the flag state’s law that is applicable extends both to working environments and to working hours, in addition to regulations about individual pay and working conditions (Evju 2007).

⁹⁴ For example, the USA excludes from domestic traffic ships that do not fly the flag of the USA or do not have US crews.

⁹⁵ For Norway’s part, there is a long list of such agreements. See for example <http://www.lovddata.no/traktater>.

⁹⁶ Now, it has to be said that around half of the Norwegian-controlled ships in foreign trade are registered in foreign registers (mainly under so-called flags of convenience). In principle, what commitments the Norwegian authorities take on with respect to other countries should be of little significance to these ships, since they do not fly the Norwegian flag and thus will not meet with possible counter-measures abroad. In addition to this, Norwegian shipping companies can also to some extent register in other countries in order to circumvent local discriminating measures.

say, conditions that involve obstruction of the free movement of labour and services are generally unlawful. Any restrictive requirement in connection with a commission or with working conditions must be consistent with so-called legitimate considerations (see also Chapter 3). In connection with the EEA Agreement, Norway has implemented two regulations intended to ensure free maritime transport in the EEA. One of them relates to the free right of transport between ports in the member states and the other relates to free transport between ports in one and the same member state (cabotage).

The EU regulatory framework for cabotage (see Chapter 3) gives the countries extensive potential to engage in cabotage in other member states but also sets limits on each country's room for national action. However, there is the potential to protect the vessels of one's own country. Several countries in the EEA also have cabotage restrictions with respect to third-party states (i.e. countries outside the EEA).

The EEA Court also allows countries to take national measures to ensure equal pay and working conditions. The use of national minimum-wage regulations and various forms of general application of collective agreements is widespread in the context of Europe. In the Norwegian context, direct regulatory measures to ensure equal pay and working conditions could be taken on the basis of the Immigration Act and the Act on General Application of Collective Agreements. The requirements with regard to pay and working conditions in these laws are largely complementary, but there is variation as regards who is affected and this provides a basis for severe discrimination and the distortion of competition to the disadvantage of NOR ships.

The most effective tool for ensuring that all the different categories of foreign worker are assured equal pay and working conditions (based on Norway's standard conditions) is general application of collective agreements (see Chapter 4.3). In order for a collective agreement to be generalised, it must be documented that the foreign workers have worse pay and working conditions than the Norwegian workers. The objects clause in the Act on General Application was amended in 2009 and the object of 'preventing the distortion of competition to the disadvantage of Norway's labour market' has now been inserted into the text of the act itself. Questions have been raised about whether this is in keeping with the EEA regulatory framework with regard to the free movement of services. The ESA (EFTA's supervisory body), however, has made the following pronouncement:

General application of collective agreements is considered to be a restriction. But it may be a lawful restriction when it is consistent with criteria from the practice of the European Court of Justice. It follows from the above that in general a system such as is introduced by the Act on General Application of Collective Agreements serves a legitimate purpose that can justify a restriction of the freedom to provide services under EEA [Agreement] Article 36. In the view of the Surveillance Authority, the provisions of the Act on General Application of Collective Agreements are appropriate and suitable for the achievement of the purpose.⁹⁷ (Translated from Norwegian)

As long as the Act on General Application is applied in keeping with the practice of the European Court then it is considered to be a lawful restriction. The terms of a generalised collective agreement are non-discriminating and extend to everyone in the area of the generalisation, i.e. Norwegians, other EEA citizens and citizens of third-party states.

Today, however, domestic trade is exempt from the provisions of the Act on General Application. When it comes to petroleum business, this is covered by the Working Environment Act, the Act on General Application and the regulation on the posting of workers (Posting Directive). For portable installations in the petroleum business, therefore, Norway has made use of

⁹⁷ ESA ruling, 15 July 2009.

its continental shelf state jurisdiction to implement the Act on General Application. The Act on General Application may also be applied to vessels on the Norwegian Continental Shelf that carry out construction, pipe-fitting or maintenance activity. Whether other vessels linked to the petroleum business may also be regarded as part of the petroleum business will probably have to be assessed in each individual case. The demarcation of shipping and petroleum operations happens against a backdrop of international law and is based on the distinction between flag state authority and continental shelf state authority (Dale et al. 2008).

Several EU countries apply a kind of minimum-wage requirement in domestic trade. Norway does not, because, for instance, EEA-registered ships are exempt from the Act on General Application (see Chapter 4). This limits Norway's potential to demand the designated pay and working conditions on EEA-registered ships with regard to traffic between Norway and ports in other EEA countries and with regard to cabotage in Norway. The reason for leaving foreign-registered ships in domestic traffic out of the Act on General Application is not clear. The draft bill reads: 'For many years, ships under foreign flags have engaged in transport between Norwegian ports. The EEA Agreement does not involve any change in this situation.' The draft bill was written during the 1992–1993 session of the Storting (Norwegian parliament), since which time the EEA has been extended by a number of nations and even several so-called flag-of-convenience countries such as Gibraltar, Cyprus and Malta.

In the EU Cabotage Regulation, Article 3(1), it says that 'all matters relating to manning' will 'be the responsibility of the State in which the vessel is registered (flag state) [...]'. There is room for various interpretations of this clause. One interpretation is that this does *not* extend to pay or working conditions but only to safety requirements. In that case, Norway could broaden the Act on General Application to apply to ships in cabotage. In any event, the regulation opens the way for applying the host state's conditions to ships under 650gt and island cabotage. The Norwegian authorities may therefore consider having a generalised collective agreement cover seafarers on EEA-registered ships, thus ensuring minimum wages and equal working conditions for seafarers on these ships. This, however, will require an amendment to the Act on General Application. If making a distinction in the regulatory framework between ships over 650gt and ships under 650gt were of interest, this could present some challenges. One obvious problem is that it will yield differing competition conditions for vessels competing in the same market.

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